Petition

81-1413

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

NO.

THE PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT AND THE PARISH OF PLAQUEMINES, LOUISIANA

Petitioners

versus

UNITED STATES OF AMERICA

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LOUIS B. PORTERIE
Attorney for Petitioners
Suite 200, 1104 Terry Parkway
Gretna, Louisiana 70001
Telephone: (504) 367-0999

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

Question Presented for Review i

Authorities iii

Opinions Below 1

Jurisdiction 4

Constitutional Questions Presented for Review ... 4

Statement of the Case 6

Arguments Amplifying the Reasons Relied On for Allowance of this Suit 14

APPENDIX A -
Opinion of the United States Court of Appeals, Fifth Circuit, Unit A, rendered September 11, 1981 ..... C-1

APPENDIX B -
Judgment and Opinion of the United States District Court for the Eastern District of Louisiana rendered September 24, 1980 ..... A-1

APPENDIX C —
Uncontested Facts Offered to Support Defendants' Case, Nos. (1) through (10) from "Plaintiff's and Defendants' Second Submission of Uncontested Facts" filed in Civil Action No. 78-3285 of the United States District Court for the Eastern District of Louisiana C-7

INDEX

Question Presented for Review i

Authorities iii

Opinions Below 1

Jurisdiction 4

Constitutional Questions Presented for Review . . . 4

Statement of the Case 6

Arguments Amplifying the Reasons Relied On for Allowance of this Suit 14

APPENDIX A -
Opinion of the United States Court of Appeals, Fifth Circuit, Unit A, rendered September 11, 1981 . . . . . A-1

APPENDIX B -
Judgment and Opinion of the United States District Court for the Eastern District of Louisiana rendered September 24, 1980 . . . . . B-1

APPENDIX C —
Uncontested Facts Offered to Support Defendants' Case, Nos. (1) through (10) from "Plaintiff's and Defendants' Second Submission of Uncontested Facts" filed in Civil Action No. 78-3285 of the United States District Court for the Eastern District of Louisiana C-1

BASIC QUESTION PRESENTED FOR REVIEW

The petition of the Plaquemines Parish Mosquito Control District and the Parish of Plaquemines, Louisiana, as a "political and legal subdivision of the State" of Louisiana (as per Louisiana Revised Statutes 33:7721), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, Unit A, of September 11, 1981 (attached as Appendix A), affirming a judgment of the United States District Court for the Eastern District of Louisiana of September 24, 1980 (attached hereto as Appendix B), wherein the United States of America had brought an action for injunctive relief and civil penalties under Section 309(b) of the Clean Water Act, 33 U.S.C.A. 1319(b), at the request of the Secretary of the Army and the Administrator of the Environmental Protection Agency.

AUTHORITIES

Constitution of United States of America,
10th Amendment 5,12,13

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 49 U.S. L.W. 4654 (June 15, 1981) 2,14,16,

Hodel v. Indiana, 49 U.S.L.W. 4667 (June 15, 1981) 2,14

National League of Cities v. Usery, 426 U.S. 833 (1976) 2,14

IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1981

No.

THE PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT AND THE PARISH OF PLAQUEMINES, LOUISIANA

Petitioners

versus

UNITED STATES OF AMERICA

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

Petitioners herein urge that the Tenth Amendment to the Constitution of the United States is applicable to the activities of the State as a state pursuant to the statutory authority hereinabove quoted,

and that the activities from which petitioners were procedurally enjoined are attributes of state sovereignty, being the preservation of the health and welfare of the citizens of the United States, the State of Louisiana, and the Parish of Plaquemines affected by the mosquito abatement/dredging activities from which the Mosquito Control District was enjoined. These activities were proceeding with the permission of the landowner upon which they were conducted - the Orleans Levee Board of the State of Louisiana, a State agency - and such injunction directly impairs petitioners' ability to structure integral operations in the areas of traditional functions.

Thus, petitioners contend that such District Court's injunction, left in place and affirmed by the Fifth Circuit Court of Appeal's opinion for which this writ is sought, runs contrary to the holdings of this Honorable States Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (June 15, 1981); *Hodel v. Indiana*, 49 U.S.L.W. 4667 (June 15, 1981), wherein the United States Supreme Court articulated a three part test to determine the applicablity of the reasoning of *National League of Cities v. Usery*, 426 U.S. 833 (1976). Such pronouncement in the *Virginia Surface* case, appearing at 49 U.S.L.W. 4654 at 4660 reads as follows:

> "First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Respondents sought injunctive relief and civil penalties under the Clean Water Act to enjoin minor ditch digging in the Bohemia Spillway area of the Mississippi River, an area owned by the State of Louisiana and subject to the jurisdiction of the Mosquito Control District of Plaquemines Parish, which District was endeavoring to carry out activities on behalf of the State of Louisiana in that area for the abatement, control, and eradication of the mosquitoes, which was of public health importance.

The nature of the activities specifically enjoined was a minimal ditching operation to permit shallow ponds to be drained into the estuarine areas to avoid the impoundment of water, in order that the breeding of mosquitoes might be avoided. The ponds to be drained are adjacent to human habitation, across the Mississippi River therefrom, in populated areas of Plaquemines Parish. The United States Distict Court tried the case and entered a judgment on September

24, 1979, enjoining petitioners' activities and rejecting the United States of America's claim for civil penalties. An appeal was taken therefrom to the United States Court of Appeals for the Fifth Circuit which, on September 11, 1981, affirmed the judgment of the lower court. A motion for rehearing was taken, and on October 15, 1981, the petition for rehearing was denied.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651(a).

CONSTITUTIONAL QUESTIONS PRESENTED FOR REVIEW

(1) See "Opinions Below and Basic Question Presented for Review" hereinabove.

(2) Whether the requirements of the Clean Water Act, as applied and administered herein - which delayed public health activities of the State of Louisiana from January 20, 1978, the date that it applied for a permit to conduct its health control activities (which results in no permit having issued until at least the day of the Fifth Circuit's opinion herein, September 11, 1981, a period of 1329 days) renders the Clean Water Act, the federal regulations [33 C.R.F.

326.4(e) suspends permit processing during litigation -further stifling the state's health activities or forcing the state to acquiesce in the United States Agency's powers] and the procedures thereunder as administered by the United States Corps of Engineers and the Environmental Protection Agency violative of the Tenth Amendment of the Constitution, regulating states as states, and stifling the attributes of state sovereignty and directly impairing their ability to structure integral operations in areas of traditional functions.

(3) Whether the District Court erred in finding, as a matter of law, that the procedures implemented by the United States Army Corps of Engineers in 33 C.F.R. 320 *et seq.* under the authority of Congress, as stated in the Clean Water Act, 33 U.S.C. 401 *et seq.*, especially 33 U.S.C. 1344 and 33 U.S.C. 1413, are constitutional, in that permits applied for by a state or local government acting on behalf of state powers are not given a presumption of validity and of being in the public interest, and are processed in the same process and order of preference (namely, as they are filed) as are any private permits sought by private individuals who are not required by a constitutional oath of office to be acting in the public interest in seeking a private permit.

(4) Whether the District Court erred in finding, as a matter of law, that the failure of the entire permit procedure, 33 C.F.R. 320 *et seq.*, to provide said presumption of affirmation of police power activities, does not violate due process of law under the Fifth Amendment of the United States Constitution as to essential state police powers reserved to them by the Tenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition in Court Below.*

The United States of America, on behalf of the Secretary of the Army and the Administrator of the Environmental Protection Agency, filed suit in the United States District Court for the Eastern District of Louisiana on October 5, 1978, complaining of action of the Plaquemines Parish Mosquito Control District, the Parish of Plaquemines, and the State of Louisiana (the State of Louisiana was voluntarily dismissed from the lower court proceeding by respondent herein), seeking relief under a myriad of federal statutes, essentially for violation of the Federal Water Pollution Control Act relative to Section 404, Dredge and Fill Permits, with consequent federal jurisdiction thereof.

The relief sought by respondent was to have the Court direct that Plaquemines Parish restore certain small mosquito control abatement ditches to their conditions prior to the action complained of, the granting of a permanent injunction from further dredging or disposition of discharges in the wetlands of Plaquemines Parish without prior approval by the United States Army Corps of Engineers, for a civil penalty of $10,000.00 per day, and for costs.

After the usual pleadings, discovery, and the entering into of a pre-trial order and petitioners' and respondent's "Second Submission of Uncontested Facts," the matter was tried before United States District Court Judge, Hon. Partick E. Carr, on August 4, 1980, whereupon the matter was submitted and briefs and reply briefs were filed.

Judge Carr rendered an opinion dated September 24, 1980, consisting of seven pages, and enjoining petitioners from taking any action in furtherance of the construction or maintenance of mosquito control ditches in the Bohemia Wildlife Management area of Plaquemines Parish until such time as a permit was obtained from the United States Army Corps of Engineers authorizing such operations, denied the request for civil penalties, and decreed that each party should bear its own costs.

An appeal therefrom was taken by the Plaquemines Parish Mosquito Control District and the Parish of Plaquemines to the United States Court of Appeals for the Fifth Circuit which, on September 11, 1981, affirmed the opinion of the lower court.

The Plaquemines Parish Commission Council and the Plaquemines Parish Mosquito Control District had filed, on January 20, 1978, a combined, after-the-fact permit and permit for future tidal flood ditching in the area in question. At the time of the Fifth Circuit's opinion, no disposition of such pending permit had been made by the United States Army Corps of Engineers, presumably pursuant to 33 C.F.R. 326,4(e).

B. *Statement of Facts.*

The facts in this matter have been largely stipulated. The United States of America brought action against Plaquemines Parish Mosquito Control District, the Parish of Plaquemines, and the States of Louisiana (since voluntarily dismissed by respondent herein), praying for injunctive relief and civil penalties arising from the actions of petitioners in dredging and placing fill materials in the Bohemia Wildlife Management area of Plaquemines Parish. Petitioners commenced dredging ditches with a marsh buggy drag

line and discharging the excavated spoil adjacent to the ditches in this area on or about December 2, 1977. This action was first observed on January 5, 1978 by government personnel and was continued until April 14, 1978. The purpose of this activity was the control of mosquitoes for the protection of the citizens in the Plaquemines Parish, Louisiana communities of Boothville, Buras, and Venice, all of which are in close proximity to the area in question.

On January 20, 1978, Plaquemines Parish applied to the United States Army Corps of Engineers for a permit for tidal flush ditching at the Bohemia Spillway for the purpose of mosquito control in the area in question. On March 17, 1978 the Corps of Engineers mailed a registered letter to Plaquemines Parish, which was received on March 20, 1978, prohibiting further work in the area until such time as petitioners received a pemit authorizing the dredge and fill operations. The Mosquito Control District of Plaquemines Parish continued dredging operations until the Corps served a cease and desist order on April 14, 1978. During the period between the letter and the cease and desist order, Plaquemines Parish and Plaquemines Parish Mosquito Control Distict continued to engage in excavation activities in the area. Under normal conditions, this area supports a prevalance of vegetation typically adapted for life and

saturated soil conditions. Further, the area in question is sometimes inundated by tidal, river, and/or rain water, and thus fits within the Corps of Engineers' definition of a wetlands as stated in the Code of Federal Regulations, Chapter 33, Section 323.2 (c).

The lower court, in its opinion of September 24, 1980, made four numbered findings of fact and conclusions of law. The record supports that there was never any written application to hold in abeyance the after-the-fact and future permit, which were combine in the filing, by anyone on Plaquemines Parish's behalf. The written evidence supports petitioners contention in this regard.

Petitioners contend that once the cease and desist order issued, the work stopped, and it has been their contention to seek legal redress from that date, and apparently also that of the Corps of Engineers, which clearly brings the process within the provisions of 33 C.F.R. 326.4(e). This means that one is deprived of the ability to have the permit application process continue despite any litigative issues which an applicant may wish to raise, thus virtually denying the public body of any redress.

Petitioners contend that the District Court's finding of fact Number 2 is irrelevant and erroneous.

Mr. Decker, the head of the United States Corps of Engineers Permit Section, testified that the type of emergency permit of time and occasionally and less than a day, is for matters of immediate life and death, no imminently prevalent here. The processing period, despite testimony to the contrary, as supported by the Corps' own records and excerpt of 'Uncontested Facts" No. 7 of Plaquemines Parish (Appendix No. C), for the issuance of mosquito abatement permits to the City of New Orleans in connection with a less controversial issue than involved here, took 7, 8, and 9 months.

Petitioners contend that the record supports the fact that, despite the filing of a combined after-the-fact and future permit by Plaquemines Parsh on January 20, 1978, at the time of trial in the District Court (31 months later), the head of the Permit Department and the chief environmentalist who testified, were unable to answer a basic question such as whether or not the permit, if granted, would require weirs which could add as much as $1,2000,000.00 to these simple mosquito ditches.

This results in undue delays in such permits and a lack of cooperation and assistance for worthwhile public pruposes, to which such state and local agencies are entiled as a presumption of law because of the

provisions of the Tenth Amendment of the United States Constitution.

Petitioners contend that the record, including the stipulations, support the proposition that the very purpose of Clean Water Act, and all of the "red tape" of its regulations and the permit here involved, when viewed from a commonsense, plain approach, are absolutely useless and unnecessary, since the areas in question are periodically flooded by tidal actions several times a year, and seasonally for months at a time by the high waters of the Mississippi River. Consequently, you could put mosquito ditches throughout the area, the purpose of which are to drain the area from rain water and avoid the short mosquito breeding cycle, and thus avoid human disease; yet there is sufficient flooding from the aforementioned forces of the Mississippi River and the Gulf of Mexico that the area's use as a future wetlands is not impinged upon whatsoever by these miniscule mosquito ditches. (See portions of Plaquemines "Uncontested Facts," Appendix C hereof.)

Put another way, it is obvious that it is a useless control and permit for control and permit's sake by the Corps of Engineers, and common sense would dictate that the permits should have been encouraged, should have been expeditiously processed, and should have been issued on an emergency basis, or on some

accelerated basis by the Corps to permit such work -admitted to be worthwhile by the Chief of the Permit Section - to proceed immediately, at the least possible cost to the taxpayers and citizens of Plaquemines Parish, whom petitioners have a sworn duty to protect from mosquito-borne diseases at the least possible economic cost.

Petitioners herein urge that the Tenth Amendment to the Consitution of the United States is applicable to the activities of the State as a state, pursuant to the statutory authority hereinabove quoted, and that the activities from which petitioners were procedurally enjoined are attributes of state sovereignty, being the preservation of the health and welfare of the citizens of the United States, the State of Louisiana, and the Parish of Plaquemines affected by the mosquito abatement / dredging activities from which the Mosquito Control District was enjoined. These activities were proceeding with the permission of the landowner upon whose land they were conducted - the Orleans Levee Board of the State of Louisiana, a State agency - and that injunction directly impaired petitioners' ability to structure integral operations in the areas of traditional functions.

Thus, petitioners contend that such District Court's injunction left in place and affirmed by the

Fifth Circuit Court of Appeal's opinion for which this writ is sought, runs contrary to the holdings of this Honorable United States Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 49 U.S.L.W. 4654 (June 15, 1981); *Hodel v. Indiana*, 49 U.S.L.W. 4667 (June 15, 1981), wherein the United States Supreme Court articulated a three part test to determine the applicability of the reasoning of *National League of Cities v. Usery*, 426 U.S. 833 (1976). Such pronouncement in the *Virginia Surface* case, appearing at 49 U.S.L.W. 4654 at 4660 reads as follows:

> "First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THIS SUIT

As an appendix hereof, find attached excerpts of petitioners' and respondent's "Second Submission of Uncontested Facts" - that portion headed "II. Uncontested Facts Offered to Support Defendants'

Case.", items (1) through (10) thereof, which were signed by counsel for the United States of America and petitioners herein, and filed of record prior to the time of trial, which amply support the basis for the granting of this writ.

THESE ARE UNCONTESTED FACTS which, coupled with the fact the this imperative state police action to protect the health and welfare of citizens on a permit filed in January 1978, and which had not been granted at the time of the issuance of the Fifth Circuit opinion on September 11, 1981, indicate that the actions of the United States of America were excessive and oppressive.

The total period of time involved are 345 days in 1978, 365 days in 1979, 365 days in 1980, and 254 days in 1981, or a period of 1329 days with no permit. From this, perhaps there should be subtracted (according to the lower court findings) the delay occasioned by the alleged verbal instructions from Plaquemines Parish through its President, Mr. Perez, to the Corps, commencing March 9, 1978 - 317 days in 1978, 365 in 1979, and 216 days in 1980 to the trial date of August 4, 1980. (Certainly by the trial date, when Mr. Perez testified that petitioners wished the permit to issue as soon as possible, the abeyance should have ended.) In any event, if one subtracts the delay (a total of 998

days), a total of 331 days is left unaccounted for in any way by the Corps of Engineers as to why no permit has issued. This is to be viewed particularly in light of "Uncontested Facts" no. 7 (Appendix C) evidencing that an average permit for mosquito control work is issued in 7 to 9 months.[1] This clearly supports the contention that this is an impermissive interference that runs afoul of the language of this Court at page 4660 of the *Virginia Surface* case, *supra*, and referred to at page 3 of the Fifth Circuit Court of Appeals' opinion of September 11, 1981, for which a writ is herein sought.

Respectfully submitted,

LOUIS B. PORTERIE
Suite 200, 1104 Terry Parkway
Gretna, Louisiana 70053
Telephone: (504) 367-0999
Attorney for Petitioners

1. The injunction suit of the United States of America was filed on October 5, 1978. 33 C.F.R. 326.4(e) suspends permit processing during litigation, further stifling the state's health activities or forcing the state to acquiesce in the United States Agency's powers.

CERTIFICATE OF SERVICE

I, Louis B. Porterie, a member of the bar of the United States Supreme Court, certify that at least one copy of the foregoing petition for certiorari has been served on the adverse party by depositing same in the United States Mail, postage prepaid, properly addressed to:

Ms. Barbara H. Brandon
Pollution Control Section
Land & Natural Resources Division
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Mr. Fred Disheroon
Pollution Control Section
Land & Natural Resources Division
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Mr. Stanley Millan
United States Corps of Engineers
P.O. Box 60267
New Orleans, Louisiana 70160

Gretna, Louisiana, this _____ day of January, 1982.

_____
LOUIS B. PORTERIE

Appendix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3285
SECTION "J"

UNITED STATES OF AMERICA

VERSUS

PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3285
SECTION "J"

UNITED STATES OF AMERICA

VERSUS

PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT

OPINION

The facts in this matter have been largely stipulated. Plaintiffs, the United States of America, bring this ac-

tion against the Plaquemines Parish Mosquito Control District and the Parish of Plaquemines praying for injunctive relief and civil penalties arising from the actions of defendant in dredging and placing film materials in the Bohemia Wildlife Management area of Plaquemines Parish. Defendants commenced dredging ditches with a marsh buggy drag line and discharging the excavated spoil adjacent to the ditches in this area on or about December 2nd, 1977. This action was first observed on January 5th, 1978 by Government personnel and was continued until April 14th, 1978. The purpose of this activity was the control of mosquitos for the protection of the citizens in the Louisiana communities of Port Sulphur, Nairne, Empire, Boothville, Buras, and Venice, all of which are in close proximity to the area in question.

On January 20th, 1978, defendant applied to the U.S. Army Corps of Engineers for a permit for tidal flush ditching at the Bohemia Spillway for the purpose of mosquito control in the area in question. On March 17th, 1978, the Corps mailed a registered letter to defendant, which was received on March 20, 1978, prohibiting further work in the area until such time as defendant received a permit authorizing the dredging and drill operations. Defendant continued dredging operations until the Corps served a cease and desist order on April 14th. During the period between the letter and the cease and desist order, defendants continued to engage in excavation activities in the area. Under normal conditions, this area supports a prevalence of vegetation typically adapted for life and saturated soil conditions. Further, the area is sometimes inundated by tidal, river, and/or rain water and thus fits within the Corps of Engineers' definition of a wetland as stated in the Code of Regulations, Chapter 33, Section 323.2(c).

The Court, having fully considered the verified complaint herein, the evidence adduced in the form of oral testimony and documents, the argument of all counsel, and the applicable law, hereby makes the following findings of fact and conclusions of law:

1. The Court finds as a matter of fact that Chalin Perez, president of the Plaquemines Parish Council, orally informed the Corps of Engineers that Plaquemines Parish wanted the permit application held in abeyance. This was done on or about March 9th, 1978. The Court finds the testimony of Charles Decker, chief of the Regulatory Functions Branch, New Orleans Division of the Corps of Engineers, persuasive on this point in that he made a written notation of this conversation. On the other hand, Perez simply testified that he "didn't remember having done so".

2. Decker testified that the average waiting time for a permit on "non-controversial matters" was seventy-two days. He further testified that emergency permits have been granted in the past, sometimes in a very short period of time and occasionally in less than a day. He testified that an emergency permit must be requested of the chief. The Court finds that this procedure was open to defendants, but defendants made no attempt whatsoever to exercise it.

3. The Court finds from the evidence that "after the fact" permits are often granted by the Corps, but that defendants did not take proper steps to secure one in this case as evidenced by the oral request that the permit application be held in abeyance.

4. From the evidence, the Court is convinced that at no time did representatives of the New Orleans District

of the Corps grant defendants' oral permission to proceed with dredging and filling activity in this wetlands area.

These findings of fact narrow the resolution of this case to the question of whether defendants were required by law to apply for a permit, and, if so, whether such requirement violates the Tenth Amendment of the United States Constitution.

REQUIREMENTS OF A PERMIT

Section 301 of the Clean Water Act, 33 U.S.C. 1311, reads as follows in pertinent part:

> "(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

33 U.S.C. 1362 reads as follows in pertinent part:

> "(6) The term 'pollutant' means *dredged spoil*, solid waste, incinerator residue, sewerage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discarded into water." (Emphasis added)

In line with these statutes, Congress has set out a procedure to regulate this type of activity. Section 404 of the Clean Water Act, 33 U.S.C. 1344, reads as follows in pertinent part:

> "(a) The Secretary may issue permits, after notice and opportunity for public hearings for the

discharge of dredged or fill material into the navigable waters at specified disposal sites."

"(d) The term 'Secretary' as used in this section means the Secretary of the Army, acting through the Chief of Engineers."

Under this section, permits are required for discharges of dredge material unless specifically excepted by Section (f) (1) of this Act. See 33 U.S.C. 1344 (f) (1) and *Avoyelles Sportsmen's League v. Alexander,* 473 F.Supp. 525 (E. D. La., 1979). It is uncontested in this case that the exceptions set out in (f) (1) do not apply to this fact situation.

Definitions used by the Corps of Engineers in application of this Act are found in Title 33 of the United States Code, Section 323.2. In pertinent part, these read:

"(k) The term 'dredged material' means material that is excavated or dredged from waters of the United States.

"(1) The term 'discharge of dredged material' means any addition of dredged material into the waters of the United States."

Further, the Seventh Circuit recently applied Section 404 of the Clean Water Act in *United States v. Byrd,* 609 F.2d 1204 (1979), holding that a discharge of fill material in wetlands adjacent to an intrastate lake could be regulated under the Commerce Clause:

"The Corps, among other authorities, has come to recognize the importance of wetlands adjacent to lakes in preserving the biological, chemical, and physical integrity of the lakes they adjoin."

Following this reasoning, the Court concludes that wetlands adjacent to an interstate river are also within the contemplation of power granted by the Commerce Clause.

Under the statutes, definitions, and facts set out above, it is clear to the Court that the plaintiffs are authorized to issue permits to cover the situation before the Court in this case. Defendants' actions were a violation of the above statutes in that pollutants were discharged into a wetland area affecting interstate commerce without proper authorization as required by Congress.

THE TENTH AMENDMENT

Defendants' main contention in this case is that the authority granted the Corps by Congress violates the Tenth Amendment in that it constitutes an impermissible interference with the state and local governments' exercise of their police powers, which are specifically reserved in the Tenth Amendment. As authority for this contention, defendant relies on the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In *Usery*, the Supreme Court held the 1974 amendments to the Fair Labor Standards Act, which extended its minimum wage and maximum hour provisions to virtually all employees of states and their political subdivisions, unconstitutional in that the amendments operated directly to displace the state's ability to structure employer/employee relations in the area of traditional government functions. The Court ruled that this

was outside the authority granted Congress by the Commerce Clause because the amendment impaired the state's ability to "function effectively within a federal system of government". From its ruling and its opinion in the *Usery* case, it appears that the Court utilized a balancing approach, a weighing of the respective competing parties' interest in the subject matter at issue. See, for example, the concurring opinion of Justice Blackmun at page 856. Such an approach is often used by the Supreme Court in cases involving the power of Congress to regulate interstate commerce. See *Morgan v. Commonwealth of Virginia*, 328 U.S. 373 (1946).

The Court finds that the interest of the United States in "restoring and maintaining the physical and biological integrity of its waters" [see 33 U.S.C. 1251 (a)] is of sufficient importance to allow Congress to constitutionally require a state agency to submit to a permit procedure for discharging pollutants into navigable waters. This finding does not ignore the importance of the state interest in this case, but simply recognizes a superior interest which is, in this Court's judgment, well within the scope of federal power afforded by the Commerce Clause of the Constitution. See *Sanitary District of Chicago v. U.S.*, 266 U.S. 405 (1925).

In addition to its attack upon the permit procedure set out in the Clean Water Act, defendants urge the Court to find that the procedure is unconstitutional as implemented by the Corps of Engineers. Specifically, the defendants urge the Court to "force the governmental bureaucracy to issue meaningful regulations and adequately inform local governments as to the manner by which they may carry out their legitimate governmental functions." What defendant asks, in effect, is for this Court to find the procedures implemented by the Corps

of Engineers under the authority of Congress, as set out in the Clean Water Act, unconstitutional.

As stated in the Court's findings of fact, however, the president of the Plaquemines Parish Council orally informed the Corps that Plaquemines Parish wanted the permit application held in abeyance. Further, there is no evidence to suggest that defendants attempted to use the emergency procedure already afforded by the Corps and found it to be lacking. In view of these facts, the Court cannot consider defendants' constitutional challenge to the procedure as implemented by the Corps. For the Court to assume that the Corps would have unconstitutionally delayed defendants' request would be to act on mere speculation and would certainly be a premature adjudicaton of a constitutional question not yet ripe for decision. The very rationale of the Supreme Court's ripeness doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. See *Abbott Laboratories v. Gardner,* 87 S.Ct. 1507 (U.S., 1967); *State of Florida v. Weinberger,* 492 F.2d 488 (5th Cir., 1974).

Having found that a violation exists in this case, the Court must consider the relief to be granted. It is clear that injunctive relief is appropriate in suits to maintain the environmental and ecological viability of effective wetlands and other waters of the United States. *U.S. v. City and County of San Francisco,* 310 U.S. 16 (1940). Because Congress saw fit to afford the Corps power to regulate activity of the kind undertaken by defendants

in this case, the Court feels that a permanent injunction should issue barring defendants from taking any action in furtherance of the construction or maintenance of the mosquito control ditches in the wetland area in question without having first obtained and appropriate permit.

The only issue remaining for decision is the imposition of civil penalties against the defendant. 33 U.S.C. 1319 (d) reads as follows:

> "(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation."

The Court feels that the imposition of a civil penalty would not be appropriate in this case. The failure of defendants to obey a registered letter from the Corps should not, in the Court's opinion, subject defendants to civil penalties, especially in view of the fact that work was halted immediately upon receipt of a cease and desist order. Further, the Court must consider the defendants' legitimate concerns for the welfare of its citizens, which acted as the motivating force for its actions.

New Orleans, Louisiana, this the 21st day of September, 1980.

/s/ Patrick E. Carr
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3285
SECTION "J"

FILED: 9-24-80

UNITED STATES OF AMERICA

VERSUS

PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT

JUDGMENT

For the written reasons attached hereto,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of plaintiff, the United States of America, and against defendants, Plaquemines Parish Mosquito Control District and the Parish of Plaquemines, enjoining defendants from taking any action in furtherance of the construction or maintenance of mosquito control ditches in the Bohemia Wildlife Management area of Plaquemines Parish until such time as a permit is obtained from the Army Corps of Engineers authorizing such operations.

Each party shall bear its own costs.

New Orleans, Louisiana, this the 24th day of September, 1980.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3823
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PLAQUEMINES PARISH MOSQUITO
CONTROL DISTRICT, ET AL.,
Defendants,

PLAQUEMINES PARISH MOSQUITO
CONTROL DISTRICT,
Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana

(SEPTEMBER 11, 1981)

Before BROWN, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

The present action for injunctive relief and civil penalties under § 309 (b) of the Clean Water Act, 33

U.S.C.A. § 1319 (b) (1977), was brought at the request of the Secretary of the Army and the Administrator of the Environmental Protection Agency. The district court entered judgment on behalf of the United States and permanently enjoined the appellant Plaquemines Parish Mosquito Control District, et al., ("Parish") from continuing to dredge in the wetland in the Bohemia Wildlife area without first obtaining a permit from the Army Corps of Engineers ("Corps"), holding that the Tenth Amendment to the Constitution does not insulate the Parish from complying with §§ 301 and 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1311, 1344 (1977) ("Clean Water Act"). The district court further held the imposition of civil penalties would not be appropriate. Parish appeals, arguing that §§ 301 and 404 of the Clean Water Act as applied to it violate the Tenth Amendment. [1] We affirm the district court.

The Bohemia Wildlife Management Area is a tidal wetland in Plaquemines Parish owned by the Orleans Levee Board. Before trial the parties stipulated that the area where Parish undertook the dredge and fill operations — the Bohemia Wildlife Management Area — was a "wetland" area (defined at 33 C.F.R. § 323.2) and thus subject to § 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (1977). Section 404 requires one to get a permit before one discharges dredged or fill material. [2] On

---

[1] The Tenth Amendment states "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[2] *See* 33 U.S.C. § 1344 (a) (1977). Dredging without a permit results in a violation of § 301 of the Act, 33 U.S.C. § 1311 (a) (1977), thus triggering judicial enforcement of the Act under § 309, 33 U.S.C. § 1319 (1977).

December 2, 1977, the appellant Parish commenced, without a permit, dredging activity in a wetland area in the Bohemia Wildlife Management Area. This activity, designed to control mosquito breeding, consisted in dredging ditches with a marsh buggy dragline and discharging the excavated spoil adjacent to the ditches. On March 17, 1978, the Corps served Parish a cease and desist order. Parish, however, continued to dredge in the wetland area until it was served a second cease and desist order on April 14, 1978. Shortly thereafter, this suit was brought.

In arguing that § 404 of the Clear Water Act violates the Tenth Amendment, Parish relies heavily on National League of Cities v. Usury, 426 U.S. 833 (1976). In *National League of Cities*, the Supreme Court held that the 1974 amendments to the Fair Labor Standards Act, which set wages and work hours of state employees, exceeded Congressional power under the commerce clause because the amendments violated the Tenth Amendment. The court reasoned that the challenged amendments would "displace the states' freedom to structure integral operations in areas of traditional government functions," *id.* at 845, and that Congress could not, consistently with the Tenth Amendment, "abrogate the states' otherwise plenary authority to make [these decisions]." *Id. at 845-46.*

The Supreme Court recently discussed *National League of Cities* and the Tenth Amendment in two opinions involving enforcement of the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act"). Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 49 U.S.L.W. 4654 (June 15, 1981); Hodel v. Indiana, 49 U.S.L.W. 4667 (June 15, 1981). In *Virginia Surface*, the Court articulated a three-part test

to succeed on a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities:*

> First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

49 U.S.L.W. 4654, at 4660. Yet a showing that these three requirements are met does not guarantee a Tenth Amendment claimant success. The Supreme Court goes on to note "there are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Id.* at 4660 n.29 (referring to Fry v. United States, 421 U.S. 542, 95 S.Ct. 1792 (1975)).

As in *Virginia Surface,* the present case does not meet the first requirement — the challenged statute must regulate "States as States." In *Virginia Surface,* the Court held that the Surface Mining Act does not violate the Tenth Amendment because the provisions do not regulate the "States as States." The Court reasoned that the provisions at most established "a program of cooperative federalism, that allows States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 4660. The Court noted the cooperative federalism character of the Surface Mining Act resembles the Clean Air Act, 42 U.S.C.A. § 7401 et seq. (1977), and approvingly noted the

Clean Air Act has "survived Tenth Amendment challenges in the lower federal courts." *Id.* at 4660. [3]

These statements and the similarities between the Clean Air Act, the Surface Mining Act and the Clean Water Act form the basis for our decision that the Clean Water Act does not regulate "States as States." Like the two above-mentioned acts, the Clean Water Act merely allows a state to enact and administer its own regulatory program, in this instance a permit program, within certain federal minimum standards. [4]

> "The Governor of any state desiring to administer its own individual and general permit program for the discharge of dredged or fill material into navigable waters . . . within its jurisdiction may submit to the Administration a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."

33 U.S.C.A. § 1344 (g) (1) (1977). Furthermore, the Clean Air Act does not require the state to administer the pro-

---

[3] The court cites Friends of the Earth, Inc. v. Carey, 552 F.2d 25, 36-39 (2nd Cir. 1977), *cert. denied*, 434 U.S. 901 (1977); Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977). Both cases upheld the Clean Air Act. Additionally, at first reading the language of the *Virginia Surface* court is confusing in that the court, after noting the Surface Mining Act governs private individuals and businesses, and establishes a program of cooperative federalism, states "in this respect" the Surface Mining Act resembles several federal statutes (the Clean Air Act in particular) that have survived Tenth Amendment challenges. 49 U.S.L.W. 4654, at 4660. The phrase "in this respect" necessarily must refer to the notion of cooperative federalism because the coverage of the Surface Mining Act does not resemble that of the Clean Air Act: in addition to private individuals and businesses, the Clean Air Act governs states and their political subdivisions. *See* 42 U.S.C. § 7602 (e) (1977).

[4] 33 U.S.C. § 1344 (h) (1977) contains the minimal federal standards required of a state permit program.

gram. In the absence of an approved permit program, the full regulatory burden will be borne by the federal government. Additionally, both the Clean Air Act and the Clean Water Act govern states and their political subdivisions, as well as private individuals and businesses. *See* 42 U.S.C.A. § 7602 (1977); 33 U.S.C.A. § 1362 (5) (1977).

Moreover, the nature of the federal interest in the Clean Water Act justifies the requirement that the state procure a permit to dredge the wetlands. In *Fry v. United States, supra*, the court held that wage controls imposed (at a time when the consumer price index was soaring at 5.9%) under the Economic Stabilization Act of 1970 applied to state and local government employees. The court observed that "the effectiveness of federal action would have been drastically impaired if wage increases were left outside the reach of these emergency federal wage controls." *Id.* at 549. Undoubtedly, a very strong federal interest also exists in the area of environmental protection. Justice Blackman filed a concurring opinion in *National League of Cities, supra*, in which he aptly states:

> In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and *does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater* and where state facility compliance with imposed federal standards would be essential.

426 U.S. at 856, 96 S.Ct. at 2476 (emphasis added). No doubt the effectiveness of the Clean Water Act would be drastically impaired by state action carried out in fur-

therance of its concern for its citizens, yet in disregard of the effect such action would have on the navigable waters of the nation.

We conclude that §§ 301 and 404 of the Clean Water Act do not violate the Tenth Amendment as applied to Plaquemines Parish Mosquito Control District. The judgment of the district court is AFFIRMED.

II. Uncontested Facts Offered to Support Defendants' case

(1) The Plaquemines Parish Commission Council is the governing authority for the Parish of Plaquemines, Louisiana. It is a unique form of local government, deriving its powers especially from its Charter for Local Self-Government, which was and is authorized by constitutional provision of the State Constitution of Louisiana (pursuant to the authority of the Louisiana Constitution of 1921, Article 14, Section 3 (d) Act 631, adopted November 8, 1960).* Its Charter for Local Self-Government was adopted March, 2, 1961, a copy of which is attached and is Defendants' Exhibit No. 1.

Its powers include the powers set forth in such Charter, as well as those of all Police Juries (Article II, Section 1, Plaquemines Parish Commission Council Charter, La. R.S. 33: 1221, et seq) of the State of Louisiana by statute, as well as powers recognized in the 1974 Constitution of Louisiana, Article 6, Section 4.

---

* Plaintiff considers this sentence to be a contention of law and not of fact.

Under such cited laws, the Charter and its powers were subject to a referendum and vote of the voters of the Parish.**

The Plaquemines Parish Commission Council on the 9th day of April, 1964, adopted an ordinance entitled "An Ordinance creating the Plaquemines Parish Louisiana Mosquito Abatement District", copy of which is made a part hereof and is attached for convenience, as Defendants' Exhibit No. 2.

(2) Mosquito abatement control affects human lives and is directly related thereto and therefore is a clearly recognized police power of local and state government, find attached:

Defendants' Exhibit No. 3 — U.S. Department of Health, Education and Welfare, Public Health Service Pamphlet entitled "Mosquitoes of Public Health Importance and their Control", revised 1969.

Defendants' Exhibit No. 4 — Blue Book pamphlet from the U.S. Department of Health, Education and Welfare, Public Health Service, C.D.C. (which stands for Communicable Disease Center), Atlanta, Georgia, dated 1964.

Defendants' Exhibit No. 5 — Publications of the U.S. Department of Health, Education and Welfare, Public Health Service, Center for Disease Control, Atlanta, Georgia, entitled "Vector Topics No. 1" Control of St. Louis Encephalitis, June, 1976, which are relevant

** Plaintiff considers this paragraph to be a contention of law and not of fact.

publications typically evidencing the life and death and human health effect of mosquito control abatement procedures of a standard nature which are the subject of this lawsuit.

Defendants' Exhibit No. 6 — The Louisiana Monthly Morbidity Report, published by the Department of Health and Human Resources, April/May, 1980, includes an update of Malaria, a mosquito borne disease in Louisiana, and diagnosis thereof as it affects human health.

Defendants' Exhibit No. 7 — News Letter No. 3, June, 1980, of the Louisiana Mosquito Control Association, a professional organization of those engaged in such public health work, evidencing the threat of Malaria at Page 4 thereof.

Defendants' Exhibit No. 8 — A summary prepared by Clark Lozes, Chief of the Mosquito Control Abatement activities of Plaquemines Parish and concurred in by Dr. Ray Varnell, Ph.D., likewise employed in the Plaquemines Parish Mosquito Abatement activities.

All clearly evidencing that there is a direct threat to human life and health by the presence of mosquitoes, consequently evidencing that mosquito abatement is essential and the control thereof is a police Power of local and state government.

(3) The area where the mosquito abatement program is to be carried out and which is affected by this law suit, is in relatively close proximity of areas populated by citizens on the West bank of the Mississippi River at the communities of 1) Port Sulphur, 2) Nairne, 3) Empire, 4)

Buras, and 5) Venice, whose aggregate population would be approximately 10,000 people (plus several thousand non-resident workers) who are affected and imperiled by the presence of such mosquitoes as the carriers of the diseases hereinabove set forth and an ensuing threat to human health and lives.

(4) The data on number of mosquitoes/generation means that the original population would be expected to increase 1000-fold by the third generation and more than 5000,000-fold by the sixth generation. Six generations are possible during a 90-day period in the summertime.

TIME INTERVAL	NUMBER OF GENERATIONS*
90 days	3-6
120 days	5-8
12 months	21

* 30-day cycle from egg to egg in winter; 15-day cycle in summer, three months of "winter" and nine months of "summer" per year.

GENERATIONS	THEORETICAL NUMBER OF MOSQUITOES**
3	1,000
4	9,000
5	72,000
6	504,000
7	3,024,000
8	12,096,000
21	363,491,000

** Average number surviving to maturity and laying eggs, beginning with one gravid mosquito.

Only the heminiverous female mosquito (the disease vector) is considered.

These calculations are based on theoretical worse case conditions.

(5) Parish plans for ditching, as hereinabove described for mosquito abatement, were not and would not be accompanied by spraying of any chemicals whatsoever into the area in question and, in fact, this ditching method of mosquito abatement control is a preferred alternative to chemical spraying. Said chemical spraying probably is not one that falls within the purview of the regulations and statutes which Plaintiff is seeking to enforce herein.

The area delineated as a wetlands in the complaint as well as Plaintiff's proposed findings of fact is more comprehensive than that area that ever was or is now a part of the Parish's mosquito abatement program in the vicinity of the area for which the Cease and Desist Order was issued and is a matter of fact. The permits that were filed, as well as the actual physical work that was done is an area that is confined to Sections 12 through 25 of Township 18 South, Range 16 East, and Sections 1 through 10 of Township 19 South, Range 16 East, and to an area within those sections lying between the banks of the Mississippi River and the Back Levee Canal, a distance which does not exceed approximately 2,300 feet from such river, whereas the sections described in the complaint and Plaintiff's findings of fact would extend back from said river more than 7,000 feet. Approximately 50% thereof was rework on pre-existing ditches which had existed since the commencement of the mosquito abatement program as early as 1964 and only 50% of

such ditching would have been new and of the miniscule quantity, namely 3 feet wide and 18 inches in depth.

The new area of work involved in current ditching, from December 2, 1977 up to April 14, 1978, consists of only about 340 acres, namely 1% of the total area of the Bohemia Wildlife Refuge. The total length of the small ditches as hereinabove described and the total amount of spoil described in such small ditches is only a total distance of approximately 7,900 feet, approximately 3 feet wide and 18 inches in depth.

The total area in the Bohemia Control area that was to be the subject of mosquito abatement work encompassed approximately 4% (1446 acres) of the 34,000 acres. In this area, 33,600 linear feet of ditches would be involved. In the above described area of work done when stopped by the Cease and Desist Order, the natural water impoundments which would have resulted and do result in the breeding of disease-carrying mosquitoes, are small, always less than ½ acre and having depths of only approximately 1 to 8 inches, and the 340 acres wherein the ditches have been placed had only approximately 5% of such ponding area relative to its entire surface, meaning that the total acreage of ponding which has been eliminated is approximately 15 acres. In the 1446 acres which would have been a part of the abatement project, 72 acres of ponding of water 1 to 8 inches in depth are affected by this ditching.

(6) The new mosquito abatement activity in question has been confined solely to the digging of shallow ditches. The prior mosquito abatement work was similar and included maintenance and repair as well as new shallow ditches. All this was done with marsh buggy

dragline which simply worked the existing ditches or the new ditch areas by simply dropping the dragline bucket into the existing soil, scooping out the soil and piling it along the edge of such ditch. No extraneous substances whatsoever were added to either the ditch or the spoil in question, and work was simply a removal of a volume of dirt, in cubic volume, measured by a bucket 3 foot wide 18 inches in depth, resulting in such dredged dirt being moved approximately 2 feet from its original position and deposited adjacent to such ditch on alternating sides in order not to interfere with normal surface drainage. The purposes of such ditches are standardly recognized prodecures for mosquito abatement in order to avoid the standing rain waters and the ensuing mosquito breeding associated therewith.

(7) The actual time it took the NOD Corps to process permits for the City of New Orleans for mosquito control in wetland areas is as follows:

Permit LMNOD-S (Orleans Parish Wetlands) No. 2
Mosquito Control

Applied for October 8, 1975
Granted June 1, 1976 — 9 months

Permit LMNOD-S (Orleans Parish Wetlands) No. 3
Mosquito Control

Applied for October 20, 1975
Granted June 1, 1976 — 8 months

Permit LMNOD-S (Orleans Parish Wetlands No. 7
Mosquito Control

Applied for March 9, 1978
Granted November 6, 1978 — 8 months

Permit LMNOD-S (Orleans Parish Wetlands) No. 8 Mosquito Control

Applied for March 30, 1978
Granted November 7, 1978 — 7 months

In its pamphlet EP-1145-5, dated November, 1978, at page 8, the Corps states:

> "Each application is evaluated to determine the probable impact the structure of activity will have on the public interest.
>
> "If there are no objections to the structure of activity, a permit usually will be issued within 60 to 90 days after your completed application is received.
>
> "Many applicants are able to resolve minor objections by modifying their proposed project during the review process . . . but many federal, state and local agencies, as well as community groups and individuals may become involved. If there are major objections or if an Environment impact Statement is required, processing time could be a year or more."

(8) None of the above described areas, in which the mosquito abatement activity occurred which is the subject of this law suit, or the permits previously filed by the Parish are located in a *navigable water* of the United States as that term was defined traditionally by the Constitution and Federal laws of the United States, including the Rivers and Harbors Act as it existed prior to

the enactment of the Clean Water Acts of 1972, as amended. See 33 CFR 320.2. The claim of jurisdiction pursuant to Plaintiff's position is limited to the applicability of the Clean Water Act to constitution derivation under the Commerce Clause of the United States Federal Constitution. Therefore, the legal issue before this Court is one of the interrelationship of the Commerce Clause, the Clean Water Act of 1972, as amended, and the regulations pursuant thereto as applied to an area that was not a traditional navigable water of the United States but is an area adjacent thereto, which in its normal state, for all but small portions of a given year, is high and dry from either Mississippi River flood waters or tidally influenced water. This Mississippi River flooding for short periods does not occur every year, and when it does occur for short periods, it does not cover the entire area in question. The area of the mosquito abatement ditches is not inundated with river or tidal water, except occasionally that which is seasonal, perhaps two to three times a year, when there is an extreme disturbance in the Gulf of Mexico resulting in hurricane warnings or storm warnings and thus being susceptible to tidal suges which may cover a portion of the small portion of the Bohemia Spillway in question herein.

(9) Plaquemines Parish, Louisiana, possesses unique physical characteristics in that it lies astride the Lower Reaches and the Mouth of the Mississippi River, the largest river in the North American Continent. It is a deltaic peninsula. The habitable area is enclosed within the Mississippi River levees and "Back Levees", which permit human habitation without flooding from the River and the Gulf or from tidal surges and storm

surges. The habitable area comprises approximately only six per cent of the surface area of the Parish. This leaves 94% of *

(10) The area that forms the basis for this litigation is owned by the Orleans Levee Board, an agency of the State of Louisiana, and prior permission in writing was obtained for the activities which form the basis of this litigation, namely Mosquito Control Abatement activities in the public interest to preserve public health and protect human lives, through the following correspondence attached:

Defendant's Exhibit No. 9. Plaquemines Parish Mosquito Control District to Orleans Levee Board dated November 29, 1967, and attachments.

Defendants' Exhibit No. 10. Reply thereto, dated December 15th, 1967.

Defendants' Exhibit No. 11. Reply thereto, dated January 3, 1968.

There was a pre-existing overall mosquito abatement plan adopted in 1964 which showed approximately 1500 acres to be ditched in the entire Bohemia area, which encompasses a total of 34,000 acres, this is shown in part (first stage — 1500 acres) on a map attached to copy of correspondence, Defendants' Exhibit No. 9.

The specific area in question had been the subject of mosquito control abatement activities, such as mosquito control ditches, for many years prior to the relevant period of this lawsuit, namely with ditches in the area

* the Parish surface outside of the leveed area.

since 1967, and a plan approved by the Landowners, State of Louisiana, predating the 1972 Clean Water Act, which is the only one which would give Plaintiff permitting jurisdiction of the area and activities in question.

Opposition

Supreme Court, U.S.
FILED
MAR 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1413

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
FRED R. DISHEROON
DIANE L. DONLEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

STANLY MILLIAN
Attorney
Office of Counsel
U.S. Army Corps of Engineers
New Orleans, Louisiana

QUESTION PRESENTED

Whether the Tenth Amendment to the United States Constitution precludes the federal government from regulating the discharge of pollutants by a local governmental agency.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Hodel v. *Indiana*, No. 80-231 (June 15, 1981) 3

Hodel v. *Virginia Surface Mining and Reclamation Association*, No. 79-1538 (June 15, 1981) 3, 4

National League of Cities v. *Usery*, 426 U.S. 833 5

Constitution and statute:

United States Constitution:

Article I, Commerce Clause 3, 4

Tenth Amendment 2, 3, 4

Clean Water Act, 33 U.S.C. 1251 *et seq.* 1-2

33 U.S.C. 1311 2

33 U.S.C. 1311(b)(1)(B) 4

33 U.S.C. 1311(b)(2)(B) 4

33 U.S.C. 1362(6) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1413

THE PLAQUEMINES PARISH MOSQUITO CONTROL DISTRICT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C-1 to C-7) is unreported. The opinion of the district court (Pet. App. A-1 to A-9) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1981. Rehearing was denied on October 15, 1981. This petition was filed on January 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).[1]

STATEMENT

This case arises out of an enforcement action brought against petitioners for violation of the Clean Water Act, 33

---

[1]The proper jurisdictional citation is 28 U.S.C. 1254(1).

U.S.C. 1251 *et seq.*[2] Petitioners, while carrying out a local mosquito control program, discharged a pollutant,[3] dredged spoil, into wetlands without having first obtained the permit required by 33 U.S.C. 1311. The essential facts establishing the violation were stipulated. The petitioners contended, however, that their mosquito control activities were exempt from the requirements of federal law under the Tenth Amendment to the United States Constitution. Alternatively, they argued that if permits were required they were entitled to special expedited procedures in obtaining such permits. The courts below rejected petitioners' arguments and enjoined all discharges of pollutants without appropriate federal permits.

After the decision of the court of appeals was rendered, the Corps of Engineers issued petitioners a permit for the work in question. The permit, issued on October 23, 1981, was delivered to petitioners within 91 days after filing of a complete permit request.[4]

ARGUMENT

This case raises only one legal issue, *i.e.*, whether the Tenth Amendment exempts petitioners from compliance with applicable provisions of the Clean Water Act. The decision of the court of appeals on this issue is correct, does

---

[2]The action was brought at the request of the United States Environmental Protection Agency and the United States Army Corps of Engineers.

[3]"Pollutant" is defined in 33 U.S.C. 1362(6) to include "dredged spoil."

[4]Petitioners erroneously claim (Pet. 15) that their activities were delayed 1,329 days by the federal permit process. The district court, however, found that this time lapse was due to petitioners' 1978 request that its permit application be held in abeyance (Pet. App. A-8). Once the permit request was reactivated, the Corps expeditiously granted the permit.

not conflict with any decision of this Court or any court of appeals, and does not warrant further review by this Court.

1. Petitioners assert that the decision of the court of appeals conflicts with the holding of this Court in *Hodel* v. *Virginia Surface Mining and Reclamation Association*, No. 79-1538 (June 15, 1981), and *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981). There is, however, no articulated reasoning in support of this contention. Petitioners merely aver that they meet the three-part test set forth by this Court in *Hodel* v. *Virginia, supra*, slip op. 21:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates "States as States." * * * Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." * * * And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

The opinion of the court of appeals (Pet. App. C-1) succinctly and carefully sets out why petitioners' Tenth Amendment argument is baseless. As that court pointed out (Pet. App. C-4 to C-5), the requirement that a local governmental agency obtain a federal permit before discharging pollutants into waters of the United States does not regulate "State as States." Neither does the regulation address matters that are indisputably "attributes of State sovereignty." This Court has never held that the public health activities of local State government are automatically beyond the reach of the Commerce Clause. Rather, in *Hodel* v. *Virginia, supra*, slip op. 24-25, this Court wrote that it had "long ago rejected the suggestion that Congress

invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the State's exercise of their police powers." Finally, the pollutant discharge permit requirement does not directly impair a state's ability " 'to structure integral operations in areas of traditional functions.' " *Hodel* v. *Virginia, supra*, slip op. 21. State and local governments remain free to structure their integral operations as they deem fit, subject only to the requirement that they obtain a federal permit prior to discharging pollutants into waters covered by the Act.

There is no basis for concluding that a county (or parish) activity is exempt from federal pollution control law merely because that activity impacts upon public health. Congress itself was concerned with the public health when it chose to regulate by means of the Clean Water Act all discharges of pollutants, whether made by private or governmental entities. Congress, for example, specifically extended the Act to cover sewage discharges from municipal waste treatment plants. 33 U.S.C. 1311(b)(1)(B) and (b)(2)(B). Such plants are clearly operated by local state bodies for public health purposes, and no city or county has ever argued that operation of these plants is exempt from federal regulation because of the Tenth Amendment. The mosquito control program of petitioners is no more vital to the public health than sewage treatment, and is likewise covered by the Act.

The Clean Water Act was made applicable to states and municipalities as well as private individuals because of the overriding national interest in protecting waters subject to federal jurisdiction from degradation. The local interest here (mosquito control) does not outweigh, as a constitutional matter, the legitimate federal interests recognized by this Court in *Hodel* v. *Virginia, supra*, slip op. 15:

> [W]e agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards * * *.

See also *National League of Cities* v. *Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (Court adopts a "balancing approach" that "does not outlaw federal power in areas such as environmental protection, where the federal interst is demonstrably greater" than that of the state or local governmental body).

2. Petitioners also argue that the regulations of the Corps of Engineers are unconstitutional because they do not establish special permit procedures for state governmental agencies (Pet. 5-6). This argument was properly rejected by the district court (Pet. App. A-8):

> As stated in the Court's findings of fact * * * the president of the Plaquemines Parish Council orally informed the Corps that Plaquemines Parish wanted the permit application held in abeyance. Further, there is no evidence to suggest that defendants attempted to use the emergency procedure already afforded by the Corps * * *. In view of these facts, the Court cannot consider defendants' constitutional challenge to the procedure as implemented by the Corps. For the Court to assume that the Corps would have unconstitutionally delayed defendants' request would be to act on mere speculation and would certainly be a premature adjudication of a constitutional question not yet ripe for decision. The very rationale of the Supreme Court's ripeness doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect agencies from judicial

interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. See *Abbott Laboratories* v. *Gardner*, 87 S. Ct. 1507 (U.S., 1967); *State of Florida* v. *Weinberger*, 492 F. 2d 488 (5th Cir., 1974).

On these facts, consideration of the constitutionality of the Corps' regulations would be premature. The issue was not argued or briefed before the Fifth Circuit. Petitioners have not shown that compliance with the Corps' permit procedures would have resulted in a constitutionally cognizable injury, and their contention that the lack of a special permit procedure unconstitutionally delayed their mosquito control program rests, as noted by the district court, on "mere speculation" (Pet. App. A-8). The issue, therefore, is unsuited for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
FRED R. DISHEROON
DIANE L. DONLEY
Attorneys

STANLY MILLIAN
Attorney
Office of Counsel
U.S. Army Corps of Engineers

MARCH 1982

DOJ-1982-03